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No. 80--1396

In The Supreme Court of the United States

October Term, 1980

JEANNE BRANDON, et al.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GUILDERLAND SCHOOL DISTRICT, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE LEADERSHIP FOUNDATION AND THE KENTUCKY HERITAGE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE GRANTING OF CERTIORARI

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INTERESTS OF THE AMICI CURIAE

The amicus Leadership Foundation, Inc., is a Washington-based foundation established in 1966 and involved in research and fact gathering for numerous family rights organizations throughout the nation, many of which have members similarly situated to the petitioners in this case. The Leadership Founda-

tion has undertaken substantial demographic research and studies for legislators and others concerning student rights of religious expression in public schools. The amicus Kentucky Heritage Foundation is a non-profit educational division of the National Heritage Foundation. In general, the Kentucky Heritage Foundation seeks to foster a public awareness of the influence of the Judeo-Christian tradition upon American life. In particular, it endeavors to promote sensitivity in academic environments towards religious expression and the protection of believers in the exercise of their religious and political rights.

The questions presented in this case are a matter of paramount importance to the purpose of the amici curiae foundations in their advocacy of rights of voluntary religious expression, freedom of association and freedom of speech for religious purposes in public school environments. This brief is filed to present the views of these amici on the preeminence of the Free Exercise Clause in First Amendment analysis, to direct this Court's attention to the prior restraint on voluntary student association and speech with religious content arising from the Court of Appeals' decision, and to suggest the opportunity which this case presents for this Court to clarify certain persistently problematic issues manifested nationally concerning the degree of protection and accommodation which public school officials must extend to the religious aspirations of their students.

STATEMENT OF THE CASE

This action arises from a request by petitioners, a voluntary association of high school students, to use a classroom of the respondent, Guilderland School District for voluntary communal prayer before school was in session (A9-10). As a matter of religious conviction, petitioner students sincerely held it to be their obligation to engage in daily communal prayer (A50). such a gathering held off of school property was effectively precluded inasmuch as the students are required to attend school and all but one of the students were dependent on the bus transportation furnished by the respondent school board directly to and from the Guilderland High School (A11, 55). Petitioner students sought a vacant classroom to meet voluntarily for religious discussion, meditation, reflection and communal prayer without any official supervision, aid or participation by school officials. Said classroom was to be used prior to the commencement of homeroom at 7:50 a.m. and first class at 8:05 a.m. Volunteer adults would serve as monitors to assure order (A8, 49, 54-55).

Respondents regularly permitted usage of school facilities by other student and community groups for other non-academic activities; [*inter alia:* a dance company, theater group, soccer club, ski team, military recruiters, Rotary exchange, a square dance club, and the Helderberg Twirlers (A15-18, 50)].

Nonetheless, respondents denied permission to the petitioner high school students to use the requested vacant classroom, even prior to the commencement of school, for the purpose of communal prayer, voluntary speech and other activity. This denial apparently occured because of the students' religious purposes and the respondents' perception that such permission would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States (A10, 42).

The District Court granted summary judgment for the respondent school board [487 Fed. Supp. 1219 (N.D.N.Y. 1980)], and the Second Circuit affirmed (635 F. 2d 971). Petitioner students now timely seek a writ of certiorari from this Court.

ARGUMENT

I. GRANTING CERTIORARI WILL RESULT IN A CLARIFICATION OF THE DEGREE OF ACCOMMODATION WHICH PUBLIC SECONDARDY SCHOOLS MUST AFFORD THEIR STUDENTS IN THE EXERCISE OF RELIGIOUS BELIEFS.

Public schools hold a special place in American life. Within their walls the great majority of American children are educated for citizenship and prepared for the responsibilities of adult life.[1]

Because of their unique role as the place where inculcation of values to the young occurs, recognized by the Court of Appeals *ab initio* (635 F. 2d 971 at 973), particular judicial solicitude is necessary to avert damage to those very values which should most be exemplified.[2] As this Court observed in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 at 637 (1943):

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason

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[1]In addition to class time, many public school students by necessity are compelled to remain at such schools long before and after actual school hours. For example, the record here discloses that the school buses arrived as early as 7:20 a.m., a half hour before the 7:50 a.m. homeroom. In the afternoon, school is dismissed at 2:45 p.m., but the last bus did not depart until 3 hours later, at 5:45 p.m. (A55).

[2]As Mr. Justice Brandeis noted, upholding values relating to personal liberty can be both an end and a means. See *Whitney v. California,* 274 U.S. 357, 375 (1927). Protection of First Amendment rights of a public school student is desirable not only because of the primary objective of preserving the student's right to freedom of choice against state encroachment, but also because such protection serves an instrumental puprose in the process of adolescent growth and development. See Garvey, "Children and the First Amendment," 57 Texas Law Review 321 (1979).

> for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

It is now beyond cavil that constitutional rights belong to minors not yet of age, as well as those who are. Justice Blackmun, speaking for the Court in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 at 74 (1976), reiterated this principle:

> Constitutional rights do not mature and come into being magically only when one attains the state - defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Neither can it be said with reference to a public secondary school that the mere locus of the exercise justifies a denial of a student's rights of freedom of speech or expression. In *Tinker v. Des Moines School Dist.*, 393 U.S. 503 at 506 (1969), this Court said:

> First Amendment rights, applied in line with the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Because the decision below concerning free exercise by public school students impacts upon the vehicle of society so instrumental in shaping future generations, clarification of the rights of such students in public school environments is of national importance. The issues of this case have implications for voluntary religious expression far beyond the confines of the Guilderland School District. The questions affect adolescent Americans in public high schools across the nation. Granting certiorari would afford this Court an opportunity to define the extent to which the "scrupulous protection" of *Barnette* must be accorded to public secondary school students in the free exercise of their religious beliefs.

An evaluation of the action of the respondent school board (denying students a place to meet for voluntary communal prayer prior to the commencement of school) in light of the five-part free exercise analysis arising from *United States v. Seeger*, 380 U.S. 163, 166 (1965), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discloses that the students admittedly satisfied the first two prongs of the test. Petitioner students allege, and respondent school board does not deny, that the practice of voluntary communal prayer is a religious belief of the students, and that such belief is truly held. (A50, 52; 635 F. 2d at 977).[1] Resolution of the free exercise issue thus depends upon the disputed third, fourth and fifth parts of the test, i.e., (3) whether student free exercise rights are in fact inhibited by the school board's action, (4) whether a compelling state interest exists to give occasion to permissible limitation of the students admitted free exercise claims, and (5) whether, even if such a compelling interest is found, an alternative less burdensome to the students' free exercise rights exists to satisy such an interest.

The Court of Appeals finds no state limitation of the students' rights under the third part of the above stated test because it perceived that the coercive restraint was not absolute (635 F. 2d at 977). However, there is no authority from this Court for such a premise that governmentally-imposed burdens on free exercise rights need be absolute to be constitutionally offensive.

Petitioner students were precluded from using a vacant classroom for voluntarily associating with each other for communal prayer and sharing of religious experience before school hours. Such restrictions on association for religious purposes, while perhaps theoretically not absolute, in fact constitute a significant restriction on religious expression, and directly impair the ability of the petitioners to meet together for such purpose at all. the functional impairment to the students' free exercise rights

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[1]The students' view that communal prayer is a desirable and necessary form of religious expression has an understandable Biblical basis. See, e.g., "For where two or three are gathered together in my name, there am I in the midst of them" *Matthew* 18:20.

becomes even more significant a burden because all but one of the petitioner students were dependent on bus service provided by the school district for transportation to and from their homes.[4] For practical purposes, alternative opportunities to gather in similar fashion elsewhere outside school hours other than in the same building which concurrently serves as both educational facility and transportation center are virtually negated.[5]

The Court of Appeals reasoned that "we have not been convinced, however, that the religious needs of the 'Students for Voluntary Prayer' require such accommodation." In so doing, it comes dangerously close to departing from the boundary of judicial inquiry in free exercise analysis set forth by this Court in *Fowler v. Rhode Island*, 345, U.S. 67 at 69-70 (1953): "It is no business of courts to say that what is a religious practice or activity for one group is not religious under the First Amendment."

Subject to the requirements of *United States v. Seeger, supra.*, the centrality of the practice of voluntary daily communal prayer and Bible study to the student's religious beliefs is a matter of conscience for the students and not an invitation for independent conjectures by a court. Rather than weigh the free exercise claims of the petitioners against the claims of a hypothetical Moslem student's prostrations to Mecca or the conjectured needs of others whose beliefs require periodic prayer (635 F. 2d at 977), the relevant judicial inquiry under the *Sherbert/Yoder* analysis should have proceeded directly to consideration of whether some

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[4]See footnote 1, *supra.*

[5]The Court of Appeals' distinguishment (635 F. 2d at 977) of *Chess v. Widmar*, _____ F. 2d _____ (8th Cir. 1980) *Cert. granted sub nom. Widmar v. Vincent*, No. 80-689 (1981); and *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934 (1976), appears to be based upon a dubious premise. High school students living in all corners of the school district and dependent on the bus service provided by the respondent school district have less, not more, freedom of movement and opportunity to gather together off-campus than do college students. Particularly is this so when, as here averred by the respondent school district's principal, "customarily all of the plaintiffs who were transported by school bus by the school district would leave the high school at the normal dismissal time of 2:45 p.m." (A55).

compelling state interest exists to give occasion for permissible limitation of the students' free exercise rights.

The Court of Appeals' concern to protect other students "in the 'captive audience' setting of a school" (635 F. 2d at 978) from peer pressure such as would create a *de facto* involuntary participation in free exercise activities prior to school hours does not constitute any such compelling state interest. In the first place, the gatherings in question occur before the student audience becomes "captive." Secondly, *direct* coercion by the state to prevent student use of otherwise unoccupied classrooms is by no means justified to prevent the indirect influence of students upon each other.

Certainly such total banning of student use of a vacant classroom before school is not the least burdensome alternative available to prevent such pressure. Indeed, the allocation of an otherwise vacant classroom prior to school to accomodate those students who wish to gather voluntarily for group prayer would seem to be less laden with the potential for such peer pressure than effectively consigning such groups to meet in whatever location at Guilderland High School other students informally gather to await the opening of school and the commencement of the homeroom period.

After assuming *arguendo* that the students' rights were significantly impaired, the Court of Appeals concluded that the Establishment Clause furnished the compelling state interest to give justifiable occasion for the limitations imposed on the students' free exercise rights. In so holding, the Court of Appeals in effect enshrined Establishment Clause responsibilities as dominant in conflict with the students' rights under the Free Exercise Clause. Such a premise is at odds with the trend of this Court's decisions and the views of many prominent constitutional scholars. See *Walz v. Texas Commission*, 397 U.S. 664 (1970); *Sherbert v. Verner, supra; Wisconsin v. Yoder, supra; McDaniel v. Paty*, 435 U.S. 618 (1978); Tribe *American Constitutional Law*, §14-7 (1978)[6]; Pfeffer, "The Supremacy of Free Exercise," 61 George-

[6]Professor Tribe concludes that "the free exercise principle should be dominant in any conflict with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." (Tribe, 833).

town L.J. 115 (1973).

The Establishment Clause, properly understood, should be viewed as a shield against governmental attempts to inhibit religion. It should not be construed as a sword by which the free exercise rights of the petitioners are to be impaled. See *McDaniel v. Paty, supra,* at 641 (Brennan, J., concurring). The discriminatory manner in which respondents have withheld permission otherwise granted student and non-student groups to use school facilities outside of school hours so as to preclude petitioners' use of said facilities solely because of their religious purposes is hardly the attitude of wholesome accommodation of conscience and non-hostile neutrality which the Free Exercise Clause and the Establishment Clause combine to foster. See *Zorach v. Clauson,* 342 U.S. 306, 313-314 (1952); *Everson v. Board of Education,* 330, U.S. 1, 16 (1947); *Abington School District v. Schempp,* 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Welsh v. United States,* 398 U.S. 333, 372-374 (1970) (White, J., joined by Burger, C.J., and Stewart, J., dissenting) ("... neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment."); *Meek v. Pittenger,* 421 U.S. 349, 386-387 (1975) (Burger, C.J., concurring in part and dissenting in part); *id* at 395-396 (Rehnquist, J., joined by White, J., dissenting) [citing P. Kauper, *Religion and the Constitution,* 79 (1964): "Any interpretation of (the Establishment Clause) and the constitutional values it serves must also take account of the free exercise clause and the values it serves."]

As Mr. Justice Douglas said for the Court in *Zorach,* there is no constitutional imperative "to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." 343 U.S. at 314.

Particularly in view of the discriminatory impact upon petitioner students of the respondents' refusal to make available to them the same facilities available to other groups, the analytic suggestions of Justice Harlan in his concurring opinion in *Walz v. Tax Commission, supra,* are particularly instructive:

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. 397 U.S. at 696.

Granting certiorari in this case would give the Court an opportunity to clarify the analytic considerations appropriate for lower courts to employ in the increasing amount of litigation wherein the protection of free exercise values create facial conflicts with apparent Establishment Clause considerations.

II. GRANTING CERTIORARI WILL PRESENT THE COURT AN OPPORTUNITY TO CONSIDER WHETHER A CONSTITUTIONALLY PERMISSABLE DISTINCTION MAY BE MADE IN A PUBLIC SCHOOL BETWEEN STUDENT VOLUNTARY POLITICAL SPEECH AND VOLUNTARY RELIGIOUS SPEECH, RESULTING IN PROTECTION OF THE FORMER AND THE BURDENING OF THE LATTER.

The teaching of this Court indicates that public academic institutions are not enclaves immune from the First Amendment. Student claims to freedom of speech and association are constitutionally cognizable interests meriting judicial protection. *Tinker v. Des Moines Independent School Dist., supra; Healy v. James,* 408 U.S. 169, 180-185 (1972).

The Court of Appeals nonetheless concluded that petitioners do not fall within the purview of such protection, apparently premised upon a content-based distinction of the differing subject matter under discussion. ["A high school classroom, however, is different. While students have First Amendment rights to political speech in public schools, sensitive Establishment Clause considerations limit their right to air religious doctrines." (citations omitted), 635 F. 2d at 980].[7]

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[7]The Court of Appeals apparently based these Establishment Clause consideration on a perceived "explicit Establishment Clause proscription against prayer in the public schools" arising from a flawed construal of *Abington*

An alternative interpretation of the Court of Appeals' rationale fails to avoid the slide down the slippery slope of association and speech restrictions based on content criteria. The decision below could alternatively be construed as justifying restrictions on student expression of religious ideas by coupling the initial categorization of speech content (i.e., "political" or "religious") with a further entangling scrutiny of religious speech based on its purpose and the identity of the speaker's intended listener. ["Equalling compelling, the students in this case propose to conduct *prayer* meetings in the high school, not merely discussions about religious matters." (emphasis by the Court of Appeals) 635 F.2d at 980].

Even voluntary speech about religious matters thus becomes dissectable according to its content and its intended listener. With regard to religious matters, purely academic commentary directed to other students is impliedly permissible. However, if the speech is directed toward the Deity instead of another student, and the speech is changed from public declaration to public supplication or thanksgiving, such speech becomes *verboten*, or at least not accomodable by school authorities.

Under such logic if the student crosses the threshold from assertions of fact to assertions of faith, his voluntary speech and association rights suddenly become suspect. Left unanswered but assumably equally suspect under the reasoning of the decision below are student acts of proselytization or evangelism on school property outside of school hours, since the Court of Appeals' implied that both "prayer" and the "right to air religious doctrines" were equally problematical (*id*).

Such content-based restrictions upon student speech in a forum made generally available to other groups is fraught with constitutional pitfalls, even if the Court of Appeals' reasoning were more

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School District v. Schempp, supra., and *Engle v. Vitale*, 370 U.S. 421 (1962), both of which cases involved *state-mandated religious exercises* by a captive student audience during school hours, not voluntary prayer by a voluntary association of students prior to the commencement of school as in the instant case.

narrowly construed. The inescapable conclusion to be drawn from the decision below is that the Court of Appeals has carved out a religion-rooted exclusion from normal constitutional protections, thus effectively sanctioning governmental discrimination among speakers based upon their messages. Such an exclusion permits restrictions upon the time, place, and manner of exercise of First Amendment rights to be content-oriented, in contravention of this Court's teaching. See *Police Dept. of the City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972).

In addition, for the school authorities to impose such burdens on voluntary student speech and association based on religious content and purpose raises again the free exercise affronts previously discussed. See Tribe, *American Constitutional Law*, 1979 Supplement at pp. 78-79.

Granting certiorari in this case would thus present this Court an opportunity to clarify whether voluntary religious speech and association on public school property, when directed to a voluntary audience outside of school hours, is equally entitled to the same constitutional cognizance and judicial protection as given to student political speech and association.[8]

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[8] The issues of the legitimate parameters surrounding prayer in public schools continue to be a focus of national attention. The Ninety-sixth Congress saw the introduction of no less than eight pieces of legislation dealing in some manner of the subject (See HR-466, HR-1173, HR-1082, HJR-70, HJR-115, HJR-131, HJR-156, and S-438). Clarification by this Court of the rights of students to engage in voluntary religious activity prior or subsequent to the school day would have the further beneficial effect of eliminating the fractious potential arising from the present uncertain status of such voluntary student activity.

SUMMARY OF ARGUMENT

The distinction employed by the Court of Appeals below in disposing of the petitioners' freedom of speech and association claims only buttresses the cogency of their free exercise claims. The same considerations which lead this Court to give strict scrutiny to any attempt in the public schools to coerce belief or mandate religious expression similarly impel strict scrutiny of discriminatory burdens officially imposed upon those who would voluntarily associate to express such belief.

The public schools cannot foster democratic values of tolerance in an increasingly pluralistic society by simultaneously pursuing policies of systematic intolerance of voluntary religious expression. Principles of wholesome neutrality toward religion will not permit the religious gerrymandering of which petitioner students are the victims.

CONCLUSION

Amici curiae respectfully urge that a writ of certiorari be issued in this case and that the judgment of the Court of Appeals be reversed.

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On this 19th day of March 1981, before me, a Notary Public for the State of Kentucky and Jefferson County, the undersigned Theodore H. Amshoff, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, copies of the Brief of the Leadership Foundation and the Kentucky Heritage Foundation as Amicus Curiae in support of the Granting of Certiorari to the following attorneys:

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SWORN TO AND SUBSCRIBED before me
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Notary Public